KENNETH CARTER

IBLA 86-299 Decided June 12, 1987

Appeal from a decision of the Arizona State Office, Bureau of Land Management, denying application for restoration of land to mineral entry. A-20884.

Set aside and remanded.

1. Mining Claims: Lands Subject to -- Mining Claims: Withdrawn Lands -- Reclamation Lands: Generally -- Withdrawals and Reservations: Reclamation Withdrawals -- Withdrawals and Reservations: Revocation and Restoration

   Where a BLM decision to reject an application to restore land withdrawn for reclamation purposes to mineral entry was based on a Bureau of Reclamation recommendation which did not explain how restoration would pose a threat of water quality degradation or indicate that restoration could not be made subject to reservations or execution of a contract by the entryman adequate to protect the public interest, the Board will set aside the BLM decision and remand the case for further consideration by the appropriate agencies.

APPEARANCES: Ronald C. Ramsey, Esq., Cottonwood, Arizona, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Kenneth Carter has appealed from a decision of the Arizona State Office, Bureau of Land Management (BLM), dated January 7, 1986, denying his application to restore the land situated in protracted sec. 23, T. 12 N., R. 5 E., Gila and Salt River Meridian, Yavapai County, Arizona, within the Prescott National Forest, to mineral entry, which application had been filed pursuant to sections 1 and 2 of the Act of April 23, 1932, 43 U.S.C. § 154 (1982), and 43 CFR Subpart 3816.

On February 25, 1971, James W. and Harold W. Bullard located the Little Squaw lode mining claim (AA-77136) on the land involved herein, and subsequently recorded their notice of location with BLM on October 17, 1979,

pursuant to section 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982). By decision dated November 28, 1984, BLM, noting that the Bullards' mining claim was situated within 1 mile of the Verde River, declared the claim null and void ab initio because BLM's records indicated that the land had been closed to mineral entry at the time of location of the claim by virtue of a "First Form Reclamation Withdrawal." 1/ The withdrawal had been accomplished by Secretarial Order dated December 14, 1904, for the benefit of the Salt River project.

On April 12, 1985, appellant filed with BLM an application (A-20884) to restore the land encompassed by the Little Squaw lode mining claim to mineral entry, noting that he had been assigned the claim under a September 20, 1983, sales agreement. Appellant argued that the claim contained a valuable deposit of onyx and that the land could be mined "without endangering irrigation interests or interests of the Bureau of Reclamation." He explained that mining operations would involve only the removal of 1 to 2 feet of overburden, which would be stockpiled and then replaced, and the extraction of the onyx, which is not a "poisonous material." He stated that no millsite or leaching area would be placed on the land.

In May 1985, BLM requested the Bureau of Reclamation to advise BLM regarding the action to be taken upon appellant's application. By memorandum dated September 26, 1985, the Acting Regional Director, Bureau of Reclamation, recommended that appellant's application be denied:

> A review of the area indicates that opening the land to mineral location, entry, and patent would not be in the best public interest due to the potential water quality degradation, including sedimentation. In addition, the Salt River Agricultural Improvement and Power District (SR) would object to any additional use of the water within the Verde River. The SR has stated that it is their belief that all surface waters of the river are fully appropriated. 2/

In its January 1986 decision, BLM denied appellant's application, relying solely on the Bureau of Reclamation's recommendation. In his statement of reasons for appeal, appellant contends that the January 1986 BLM decision was improper because it failed to address appellant's assertions in his application that the land contains a valuable mineral deposit and that mining operations would not endanger any irrigation interests, but, rather, dealt with his application in a summary fashion.

1/ In his subsequent restoration application, appellant stated that "[n]o appeal of the [November 1984 BLM] decision was filed by [the] locator." In fact, the Bullards did file an appeal and the November 1984 BLM decision was affirmed by the Board in James W. Bullard, 91 IBLA 391 (1986).

2/ On appeal, appellant states that he is "not going to be taking any water from the river," thereby alleviating SR's objections. If the land is restored to mineral entry, appellant could be required to stipulate to that limitation under 43 U.S.C. § 154 (1982).

[1] Sections 1 and 2 of the Act of April 23, 1932, provide the Secretary of the Interior with discretionary authority to restore land subject to a first-form reclamation withdrawal to mineral entry "when in his opinion the rights of the United States will not be prejudiced thereby" and to take certain other action. 43 U.S.C. § 154 (1982). In particular, the statute provides that the Secretary may

> [reserve] such ways, rights, and easements over or to such lands as may be prescribed by him and as may be deemed necessary or appropriate * * * and/or the said Secretary may require the execution of a contract by the intending locator or entryman as a condition precedent to the vesting of any rights in him, when in the opinion of the Secretary same may be necessary for the protection of the irrigation interests.

Where the Bureau of Reclamation recommends against restoration of land to mineral entry, BLM is required to reject an application for restoration under 43 CFR 3816.3. However, there is no such limitation on the Board. However, we have generally affirmed BLM's rejection of an application for restoration where that decision is based on cogent reasons indicating that restoration is contrary to the public interest. Robert Limbert, 85 IBLA 131, 133 (1985), and cases cited therein. BLM's discretion with respect to applications to restore land to mineral entry is not unfettered. BLM is bound to act in a manner which is not arbitrary or capricious. In the complete absence of cogent reasons to support its decision, we would have to conclude that BLM had acted in an arbitrary and capricious manner.

In the present case, BLM's decision to deny appellant's application was premised solely on the Bureau of Reclamation's conclusion that restoring the land to mineral entry would pose a threat of "potential water quality degradation." However, the Bureau of Reclamation does not explain in what manner location, entry, and patent under the general mining laws would pose such a threat. 3/ In addition, the record does not allow us to conclude that restoration could not be made subject to necessary or appropriate reservations that would protect the public interest or execution of a contract that would protect "irrigation interests." 43 U.S.C. § 154 (1982). In particular, appellant has not specifically proposed any measures which would ensure the protection of irrigation interests. However, as described, it does not appear that mining operations could not be limited in scope and manner so as to protect such interests.

In such circumstances, we believe that the appropriate course of action is to set aside the January 1986 BLM decision and to remand the case to BLM. See G. W. Daily, 34 IBLA 176 (1978). BLM is not required to restore the land to mineral entry. We are simply holding that the present record is not adequate to support denial of appellant's application. On

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3/ On appeal, appellant speculates that the Bureau of Reclamation is afraid that mining operations will be in a "potential flood-way" or that the area would be inundated by "future dam sites," in each case posing a threat of water quality degradation. In fact, however, we simply do not know what the Bureau of Reclamation envisions.

remand, BLM should, prior to readjudicating appellant's application, seek additional information from the Bureau of Reclamation regarding how location, entry, and patent under the general mining laws would pose a threat of water-quality degradation or otherwise be contrary to the public interest, as well as whether necessary or appropriate reservations could be devised to protect the public interest or whether appellant could be required to execute a contract to protect irrigation interests. 4/ In conjunction with providing that information, the Bureau of Reclamation should reconsider its decision to recommend rejection of appellant's application. Based on that further recommendation, BLM will readjudicate appellant's application. An adverse determination by BLM will, of course, be again subject to appeal to the Board.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded to BLM for further action consistent herewith.

Franklin D. Arness
Administrative Judge

We concur:
Anita Vogt
Administrative Judge
Alternative Member

Will A. Irwin
Administrative Judge.

4/ The authority to restore the land to mineral entry is also limited to those situations where public land is "known or believed to be valuable for minerals and would, if not so withdrawn, be subject to location and patent under the general mining laws." Appellant has alleged that the land involved herein contains a valuable mineral deposit. However, this is not a foregone conclusion. Accordingly, on remand, BLM may determine by mineral examination or otherwise whether appellant has satisfied this criterion. Robert Limbert, supra.